Chicago-Kent Law Review

Volume 85
Issue 1 *Symposium on Criminal Procedure*

Article 19

December 2009

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DON'T BET ON IT: CASINOS' CONTRACTUAL DUTY TO STOP COMPULSIVE GAMBLERS FROM GAMBLING

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INTRODUCTION

Compulsive gambling[1] presents a serious threat to the integrity of the casino industry.[2] While most patrons frequenting casinos are recreational gamblers, approximately two million of Americans have a serious gambling addiction.[3] This translates into substantial social and economic costs: several studies indicate that over twenty percent of compulsive gamblers quit work or are fired; nearly fifteen percent are hospitalized with health problems related to gambling; almost two thirds planned suicide; a majority had stolen property because of gambling; and each compulsive gambler has an average gambling debt of over sixty thousand dollars.[4]

To address this problem, industry leaders formulated a concept of physically banning from gaming facilities those players who are unable to control their gambling addiction.[5] As a result, Missouri promulgated the first state-wide self-exclusion program in 1996.[6] Now, the vast majority of jurisdictions with legalized commercial casinos,[7] with the major exception

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1. Compulsive gambling is a subset of the "problem gambling," which is defined as "gambling behavior patterns that compromise, disrupt or damage personal, family or vocational pursuits. The essential features are increasing preoccupation with gambling, a need to bet more money more frequently, restlessness or irritability when attempting to stop, 'chasing' losses, and loss of control manifested by continuation of the gambling behavior in spite of mounting, serious, negative consequences." National Council on Problem Gambling (NCPG), *Frequently Asked Questions: Problem Gamblers*, http://www.ncpgambling.org/i4a/pages/index.cfm?pageid=3390 (last visited Feb. 14, 2009).

2. William N. Thompson, Robert W. Stocker, & Peter J. Kulick, *Remedying the Lose-Lose Game of Compulsive Gambling: Voluntary Exclusions, Mandatory Exclusions, or an Alternative Method?*, 40 J. MARSHALL L. REV. 1221, 1221 (2007).

3. NCPG, *supra* note 1.

4. Thompson, *supra* note 2, at 1229.

5. Carol O'Hare, *Self-Exclusion—Concept vs. Reality*, 8 GAMING L. REV. 189, 189 (2004).

6. *Id.*

7. The American-Indian casinos are outside the scope of this note because they are specially regulated by tribal governments, United States Congress, the Interior Department, the National Indian Gaming Commission, as well as by states, but only under the terms of negotiated tribal-state gaming

of Nevada, have mandatory state-prescribed self-exclusion regulations.[8] The remaining jurisdictions, such as Nevada, South Dakota, and Rhode Island,[9] permit casinos to adopt and implement their own facility-based self-exclusion programs.[10]

Self-exclusion programs have provided compulsive gamblers with new theories on which to base litigation seeking to recover gambling losses. Suspecting that deep-pocketed, "evil-spreading" casinos would be vulnerable to litigation initiated by them, compulsive gamblers had filed lawsuits in attempt to recover gambling losses long before self-exclusion programs were implemented.[11] The self-exclusion option not only helped problem gamblers fight their addiction but also provided them with novel theories of liability to pursue against the gambling establishments.[12] Among those theories was a breach of contract cause of action.[13] The patrons alleged that a self-exclusion form constituted an enforceable contract that is breached by the state and/or the casino if the patrons are not prevented from gambling every time they relapse and return to the casino.[14] It follows then, that the self-excluded patrons could recover damages caused by a state's and/or casino's failure to prevent them from gambling, including any gambling losses. However, no American court has yet ruled in favor of such plaintiffs.[15]

Part I of this note describes the two existing kinds of the self-exclusion programs: (1) those administered by the states and (2) those that individual casinos voluntarily undertake to provide for their patrons. Part II discusses whether either type of a self-exclusion program creates a contractual relationship between the self-excluded patron and the state and/or the casino that administers the self-exclusion program, and argues that even if

compacts. The Indian Gaming Regulatory Act, 25 U.S.C. 2710 (2006).

8. Thompson, *supra* note 2, at 1245.

9. Rhode Island allows privately-operated gaming establishments to provide nearly all kinds of gaming, excluding table games; however, the gaming itself is considered a state-operated lottery. *See* Rhode Island Lottery, *Video Lottery*, http://www.rilot.com/video.asp (last visited Sept. 7, 2009).

10. *See* Thompson, *supra* note 2, at 1245.

11. *See* Joy Wolfe, *Casinos and the Compulsive Gambler: Is There a Duty to Monitor the Gambler's Wagers?*, 64 MISS. L.J. 687, 690-94 (1995) (describing numerous contract and tort law suits the gamblers used to bring against casinos to recover gambling losses before self-exclusion programs were implemented).

12. Dee McAree, *Long-Shot Legal Tactic*, LAW.COM, Mar. 17, 2004, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005538359.

13. *See* Adam Goldman, *Casino Blacklists Prove to Be a Dicey Proposition*, LAS VEGAS SUN, Feb. 23, 2004, *available at* http://lasvegassun.com/news/2004/feb/23/casino-blacklists-prove-to-be-a-dicey-proposition.

14. *See id.*

15. Andy Rhea, *Voluntary Self Exclusion Lists: How They Work and Potential Problems*, 9 GAMING L. REV. 462, 463 (2005).

it does, the patrons could not and should not be able to recover gambling losses. Finally, Part III shows that the provisions of the self-exclusion document that release the states and the casinos from any liability in connection with administering the self-exclusion programs are not against public policy and should be upheld.

I. SELF-EXCLUSION PROGRAMS: WHAT THEY ARE AND HOW THEY WORK

A self exclusion program is a mechanism by which a patron petitions to be physically removed from the casino if he is discovered on the premises. Nearly every commercial casino within the United States provides its patrons with some sort of a self-exclusion or self-limit option if they feel that they are unable to restrain themselves from patronizing the casinos and gambling.[16] Most states have enacted statewide self-exclusion programs, which are administered by the state gaming board or commission.[17] The remaining states permit the gaming establishment to institute facility-based programs, and the casinos have done so to promote responsible gambling and to assist problem gamblers in fighting their addiction.[18]

A. State-administered programs

In the states with a state-wide regulation of self-exclusions, an individual may seek to be banned from all casinos within the borders of the state by entering into a unified self-exclusion program.[19] The regulations do not vary significantly from state to state.[20]

Initiation of the program. In order to request self-exclusion, a patron will have to appear in person in any office of the state gaming board or commission, which is also located on the premises of each gaming facility in the state.[21] The patron must provide information about his[22] age, appear-

16. Thompson, *supra* note 2, at 1245.

17. *See id.*

18. *See, e.g.*, Harrah's Entertainment, *Responsible Gambling*, http://www.harrahs.com/harrahs-corporate/about-us-responsible-gaming.html (last visited Sept. 20, 2009).

19. Thompson, *supra* note 2, at 1246.

20. *Id.*

21. *See generally* Ill. Adm. Code, tit. 86, § 3000.746-786 (2007), *available at* http://www.ilga.gov/commission/jcar/admincode/086/08603000sections.html; Ind. Adm. Code tit. 68, r. 6-3-1 through 6-3-5 (2009), *availale at* http://www.in.gov/legislative/iac/iac_title?iact=68&iaca=6; La. Admin. Code tit. 42, pt. III, § 304 (2007), *available at* http://doa.louisiana.gov/osr/lac/books.htm; Mich. Comp. Laws Ann. § 432.225 (2001), *available at* http://www.legislature.mi.gov/(S(lj4iffrku1xqoi45p2s0s3yw))/mileg.aspx?page=getobject&objectname=mcl-432-225; Miss. Gam. Comm. Reg. Art. III (J), Mississippi Gaming Commission, *available at* http://www.mgc.state.ms.us; MO Code Regs. Tit. 11, § 45-17.010 through § 45-17.050, *available at*

ance, address, social security number, and his picture will be taken and placed in the security office of the facility.[23] The duration of the self-exclusion program varies from state to state and ranges from one year to a lifetime exclusion.[24] The patron then must sign a state-designed form that summarizes terms and conditions of the program.[25] The state's gaming commission will then provide his information to all casinos within the state for implementation.[26]

Patrons' Obligations. Each state imposes at least two obligations upon self-excluded individuals: (1) to refrain from entering gaming facilities and gambling and (2) to release the state and the casinos from any liability associated in any way with the self-exclusion program.[27]

Casinos' Obligations. First, each facility must create and follow appropriate internal procedures for handling self-exclusion requests.[28] Sec-

http://www.sos.mo.gov/adrules/csr/current/11csr/11c45-17.pdf; N.J. Stat. Ann. § 5:12-71.2-71.3, *available at* http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=1297456&Depth=2&depth=2&expandheadings=on&headingswithhits=on&hitsperheading=on&infobase=statutes.nfo&record={30D5}&softpage=Doc_Frame_PG42; N.J. Admin. Code tit. 19, § 48-2.1 through § 48-2.5, *available at* http://www.state.nj.us/casinos/actreg/reg/docs_chapter48/c48s02.pdf; Pa. Cons. Stat. Ann, tit. 4, § 1516; Pa Code tit. 58, Ch. 503A, *available at* http://www.pacode.com/secure/data/058/ chapter503a/058_0503a.pdf.

22. Two thirds of the problem gamblers are men. Roberta Boughton & Olesya Falenchuk, *Vulnerability and Comorbidity Factors of Female Problem Gambling*, 23 J. GAMBLING STUD. 323, 323-24 (2007). Therefore, for the purposes of conservation of space and simplicity for the reader, all pronouns referring to a patron of a casino will be in a masculine form.

23. *See, e.g.*, Ind. Admin. Code tit. 68, r. 6-3-2(d).

24. *See, e.g.*, Miss. Gam. Comm. Reg. Art. III (J)(2)(c)(2).

25. *See* Colorado Gaming Association, *Voluntary Self-Exclusion Application and Waiver*, June 28, 2009, http://dev.coloradogaming.com/web-documents/Self-Exclude%20Final%20Application%2011-11-08.pdf (Colorado Self-Exclusion Form); Illinois Gaming Board, *IGB-15, Application to the Voluntary Self-Exclusion Program for Problem Gamblers*, (on file with the *Chicago-Kent Law Review* office) (Illinois Self-Exclusion Form); Indiana Gaming Commission, *Request for Voluntary Exclusion*, June 2004, http://www.in.gov/igc/files/vep-application-sample.pdf (Sample Form) (Indiana Self-Exclusion Form); Iowa Gaming Association, *Iowa Statewide and Lifetime Self-Exclusion Form*, Dec. 8, 2008, http://www.iowagaming.org/support/media/responsible_gaming/pdf/Self-Exclusion_Form.pdf (Iowa Self-Exclusion form); Louisiana Gaming Control Board, *Request for Self-Exclusion from Casino Gaming*, http://lgcb.dps.louisiana.gov/lgcb.nsf/$web/VoluntaryExclusion (click on "Request for Self-Exclusion.doc") (Louisiana Self-Exclusion Form); Mississippi Gaming Commission, *Request for Self-Exclusion*, Nov. 3, 2003, http://www.mgc.state.ms.us/pdf/SelfExclusionProcedures.zip (Mississippi Self-Exclusion Form); Missouri Gaming Commission, *Voluntary Exclusion Program for Problem Gamblers*, July 2003, http://www.mgc.dps.mo.gov/prob_gambling/vep_appl.pdf (Missouri Self-Exclusion Form); New Jersey Casino Control Commission, *Request for Voluntary Exclusion from Casino Gambling*, Jan. 4, 2007, http://www.state.nj.us/casinos/licens/info/docs/sel_app_20070104.pdf (New Jersey Self-Exclusion Form); Pennsylvania Gaming Control Board, *Request for Voluntary Self-Exclusion from Gaming Activities*, Dec. 4, 2006, http://www.pgcb.state.pa.us/files/compulsive/Self_Exclusion_ Application_and_Instructions.pdf (Pennsylvania Self-Exclusion Form) (collectively States' Self Exclusion Forms).

26. Rhea, *supra* note 15, at 464.

27. *See* States' Self-Exclusion Forms, *supra* note 25.

28. *See, e.g.*, Mich. Comp. Laws Ann. § 432.225 (8) (2009).

ond, the casinos must not knowingly provide gambling, wagering, and check-cashing privileges to self-excluded patrons.[29] Third, the casinos must keep confidential the identities of persons placed on the state's self-exclusion list and disclose this information only to those employees who are responsible for implementing and enforcing the program in its facility.[30] And finally, the casinos must make reasonable efforts to ensure that self-excluded persons do not receive direct marketing materials and solicitations.[31] No state imposes an obligation on casinos to actually prevent self-excluded patrons from entering their facilities; rather, at most, some states prohibit the casinos from "knowingly" allowing those patrons to access the gaming areas.[32]

Consequences for the violation of the terms of the program. Casinos and patrons alike face negative consequences for failing to comply with the conditions of the self-exclusion program, although not with respect to each other. Under each state's regulations, casinos are subject to disciplinary actions by the gaming commissions for failure to comply with the state-imposed obligations, including fines, revocation or suspension of the gaming license or operation certificate, and other sanctions.[33] However, many states limit the grounds for disciplinary actions to violations related to mishandling of confidential information on the self-exclusion lists, failure to follow internal procedures, and knowingly refusing to withhold direct marketing and check cashing privileges.[34] The statutes specifically exclude sanctions for failure to prevent self-excluded persons from entry or even gambling.[35]

On the other hand, patrons who are discovered on the premises of the casinos in violation of their self-exclusion will be immediately removed from the facility and, in the discretion of the casino, may be subject to arrest and prosecution for criminal trespass in most states.[36] In addition, the forfeiture of any winnings by the self-excluded person is a condition of joining the program in all states except for Colorado.[37]

No liability to patrons on the part of the states and the casinos. Every state's regulations also contain a section that incorporates the release and

29. *See, e.g.*, Ind. Admin. Code tit. 68, r. 6-3-4(b)(3) (2009).
30. *See, e.g.*, Ill. Admin. Code tit. 86, § 3000.760 (2007).
31. *See, e.g.*, Ind. Admin. Code tit. 68, r. 6-3-4(b)(4).
32. *See, e.g.*, Ill. Admin. Code tit.86, § 3000.770(a).
33. *See, e.g.*, Mich. Comp. Laws Ann. § 432.225 (11).
34. *See, e.g.*, Ind. Admin. Code tit. 68, r. 6-3-4 (e).
35. *Id.* at 6-3-2(d)(3).
36. *See generally* States' Self-Exclusion Forms, *supra* note 25.
37. *Id.*

discharge of any liability associated with administering the self-exclusion programs by the state gaming commission or board, and the individual casinos.[38] The patron who wishes to participate in the self-exclusion program must sign a release form which, at a minimum, acknowledges that: (1) he will not hold the casinos liable for not preventing him from entering and gambling at the facility, and for any damages associated with it, including gambling losses; (2) the program is voluntary and imposes no duty on the part of the casinos to prevent this patron's access to their facilities; and (3) it is the patron's responsibility to practice self-restraint in the attempt to alleviate his gambling addiction.[39] Some states' statutes are even more specific, explicitly stating that participation in the self-exclusion program does not create any cause of action on behalf of the self-excluded person against the state, its gaming board or commission, or an individual casino.[40]

Forfeiture of the winnings. Every state's regulation, except Colorado's, contains a provision that if a patron enters the gaming facility in violation of his self-exclusion and wins anything of value while gambling, he must forfeit the winnings.[41] However, in no state do the forfeited winnings remain with the casino; instead, they are sent to the state gaming commission or a charity.[42] For instance, in New Jersey, the forfeited winnings are appropriated to the State General Fund and distributed to provide funds for compulsive gambling treatment and prevention programs.[43] In Illinois, the patron at the time of his self-exclusion initiation will decide which charity will receive the winnings in the event he gambles in violation of the program's conditions.[44]

Clearly, entering into a self-exclusion program by a patron creates certain obligations on the part of all the parties involved, and both the patrons and the casinos are liable (though not to each other) for not carrying out their obligations. However, no contract is signed by the parties; only a document confirming participation in the program.[45] Nevertheless, some plaintiffs have attempted to rely on this document as a basis for a cause of action against the state gaming board and the casino sounding in breach of

38. *See, e.g.*, La. Admin. Code tit. 42, pt. III, § 301; N.J.S.A § 5:12-71.2.
39. *See, e.g.*, Iowa Self-Exclusion Form, *supra* note 25.
40. *See, e.g.*, Mich. Comp. Laws Ann. § 432.225 (14) (2009).
41. *See* States' Self-Exclusion Forms, *supra* note 25.
42. *Id.*
43. N.J.S.A § 5:12-71.3.
44. IL Admin. Code tit. 86, § 3000.756.
45. *See* States' Self-Exclusion Forms, *supra* note 25.

contract.[46]

B. *Casino-administered programs*

The major gaming state without a state-imposed self-exclusion program is, of course, Nevada.[47] It would be nearly impossible to enforce the program in hundreds of casinos across the state, gaming officials believe.[48] The Nevada Gaming Commission regulations only require gaming properties to implement standards and procedures that would allow patrons to self-limit themselves from access to check-cashing, the issuance of credit, and participation in direct mailing of promotional materials.[49]

However, some Nevada casinos have gone beyond the minimum requirements of the regulations. For instance, Harrah's Entertainment has launched a comprehensive responsible gaming program offering its patrons a wide-ranging assistance in fighting the gambling addiction.[50] It includes not only a general Nevada self-limitation option, but also a self-exclusion program that allows a guest to request that all privileges, including gambling and access to all Harrah's owned and operated properties, be denied.[51]

Harrah's' voluntary self-exclusion program is two-fold. First, Harrah's pledged to honor a patron's self-exclusion request in all of its properties worldwide.[52] Thus, if a patron fills out a self-exclusion form in Harrah's casino in New Jersey, this request will be effective in all Harrah's properties, including in those states where self-exclusion programs are not manda-

46. *See* McAree, *supra* note 12.

47. Thompson, *supra* note 2, at 1245.

48. Liz Benston, *Self-Exclusion Programs Unlikely in Nevada*, LAS VEGAS IN BUSINESS, Jan. 09, 2004, *available at* http://www.inbusinesslasvegas.com/2004/01/09/gaming.hml (last visited Jan. 25, 2009).

49. Nevada Gaming Commission and State Gaming Control Board Reg. 5-170(4) "Programs to address problem gambling," (Nevada Regulation 5-170), *available at* http://gaming.nv.gov/stats_regs/reg5.pdf (last visited Nov. 25, 2008); *see also* MGM Mirage Self-Limit Access Program, Sept. 2007 (on file with the *Chicago-Kent Law Review*) (allowing the patrons to request to be removed from all personal check cashing and marker privileges, direct mail marketing and promotional lists, and player recognition programs); American Casino & Entertainment Properties, LLC (Stratosphere), *Problem Gambling Self-Limit Form* (on file with the *Chicago-Kent Law Review*) (providing that the patron signing the form will be prohibited from check cashing and issuance of credit, excluded from promotional activities, removed from the Players' Club, and removed from direct mailing lists).

50. Harrah's Entertainment, *supra* note 18.

51. *Id.*

52. *See* E-mail from George Gifford, Harrah's Responsible Gaming Department, to Author (Dec. 1, 2008) (confirming that the self-exclusion request filed with the Harrah's casino in Illinois will be effective in all Harrah's properties).

tory, as in Nevada.[53] It follows that a Harrah's casino in Nevada will be bound by the self-exclusion requests filed in other states on the terms and for the period of time stated in the self-exclusion document of other states.[54]

Second, Harrah's casinos in Nevada have their own self-exclusion program that is available for those patrons who wish to self-exclude themselves in Nevada.[55] The terms of this program are largely the same as those in the state-administered self-exclusions: (1) the patron could exclude himself for either one year, five years, or permanently; (2) it is the patron's responsibility to refrain from visiting the facility, and the casino is only undertaking to eject the patron if he is discovered on the premises; and (3) the patron releases the casino from any liability associated with the enforcement of his self-exclusion request.[56]

The Rhode Island's Twin River casino also voluntarily administers the self-exclusion program for its patrons.[57] The patron must sign a simple form acknowledging that (1) it is not a contract but rather a service; (2) he will be ejected and arrested for trespass if discovered on the premises; and (3) the casino is not liable for any damages associated with the self-exclusion.[58] But in spite of good intentions and willingness to help problem gamblers to overcome their addictions, those casinos that voluntarily provide the self-exclusion program are exposing themselves to a potential liability to the self-excluded patrons, especially if those patrons find their way back to the casino and lose money while gambling.[59]

53. *See* State of New Jersey, *Request for Voluntary Exclusion from Casino Gambling - Instructions, available at* http://www.state.nj.us/casinos/probgamb/docs/sel_app_ins_20081118. pdf (last visited Jan. 28, 2009) (warning the self-excluding patrons about extra-territorial reach of the Harrah's program).

54. *See id.* (stating that under the Harrah's Responsible Gaming Program, "persons signing up for state self-exclusion lists are banned from Harrah's properties worldwide for the length of their state self-exclusion terms").

55. *See* Email from George Gifford, Harrah's Responsible Gaming Department, to Author, Nov. 26, 2008 (describing the self-exclusion program administered by Harrah's Entertainment for its patrons).

56. Harrah's Self-Exclusion Form, June 22, 2007, (on file with the *Chicago-Kent Law Review*).

57. *See* E-mail from Craig L. Eaton, Sr. Vice President and General Counsel of BLB to Author (Feb. 17, 2009) (explaining the logistics of the program). BLB is a multistate gaming, racing, and entertainment holding that owns Twin River. *See* Twin River, *So Much, So Close*, FOXPROVIDENCE.COM, Feb. 17, 2009, http://www.foxprovidence.com/dpp/wildcard_8/wildcard_84/local_wnac_twin_river_so_much_so_close_20090217.

58. Twin River, *Self-Exclusion for One Year* (on file with the *Chicago-Kent Law Review*) ("Twin River's Self-Exclusion Form").

59. *See* Rod Smith, *Gaming Company Starts Ban*, LAS VEGAS REVIEW-JOURNAL, Dec. 10, 2003.

II. SELF-EXCLUDED PATRONS SHOULD NOT BE ABLE TO RECOVER GAMBLING LOSSES IN A BREACH OF CONTRACT ACTION.

Before self-exclusion programs were implemented, gamblers sued casinos mostly on tort theories of liability, including negligence, fraud, malicious conduct,[60] and intentional and malicious enticement.[61] Some plaintiffs also questioned the validity of credit extension contracts arguing that casinos intentionally caused gamblers to incur debt by compulsion sufficient to overcome their free will, such that the patrons were incapable of understanding the terms and the essence of the extension of credit contract.[62] However, a court has yet to find that casinos owe a duty of care to problem gamblers.[63] The courts continue to hold that casinos' duty to patrons is similar to any other establishment and amounts merely to a duty to keep the premises safe and to protect patrons from foreseeable risks.[64]

After self-exclusion programs were implemented, some gamblers realized that these programs could serve as a convenient tool for holding casinos liable for their gambling losses. These gamblers sought to "hit the jackpot" in litigation claiming that the casino industry owed compulsive gamblers a duty to protect them from themselves.[65] They asserted casinos' liability in breach of contract,[66] unjust enrichment,[67] negligent breach of a statutory duty owed to a self-excluded person,[68] and even a Racketeer Influenced and Corrupt Organization Act (RICO) violation based on mail fraud.[69] Again, all plaintiffs' attempts thus far have been unsuccessful.

There are at least two major reasons why courts might be reluctant to hold casinos liable to compulsive gamblers in a breach of contract action. First, it is questionable whether the self-exclusion arrangement constitutes enforceable contract for lack of consideration.[70] But even if courts would

60. GNOC Corp. v. Aboud, 715 F. Supp. 644, 648 (D.N.J. 1989).

61. Hakimoglu v. Trump Taj Mahal Assocs., 876 F. Supp. 625, 627 (D.N.J. 1994).

62. Lomonaco v. Sands Hotel Casino & Country Club, 614 A.2d 634, 635–36 (N.J. Super. Ct. Law Div. 1992).

63. Rhea, *supra* note 15, at 463.

64. Merrill v. Trump Ind., Inc., 320 F.3d 729, 732–33 (7th Cir. 2003).

65. *See* Williams v. Aztar Ind. Gaming Corp., 2003 WL 1903369, at *1 (S.D. Ind. Apr. 5, 2003) (unpublished opinion) (vacated on other grounds by Williams v. Aztar Indiana Gaming Corp., 351 F.3d 294 (7th Cir. 2003).

66. *Merrill*, 320 F.3d at 731.

67. Taveras v. Resorts Int'l Hotel, Inc., 2008 WL 4372791, at *6 (D.N.J. Sept. 19, 2008) (unpublished opinion).

68. Stulajter v. Harrah's Ind. Corp., 808 N.E.2d 746, 747–48 (Ind. App. 2004).

69. Williams v. Aztar Ind. Gaming Corp., 351 F.3d 294, 296, 298 (7th Cir. 2003).

70. Cecil VanDevender, *How Self-Restriction Laws Can Influence Societal Norms and Address*

treat the self-exclusion document as a contract, it would necessarily contain a provision that releases the state and/or the casino from any liability associated with administering or enforcing the self-exclusion requests.[71] In addition, in the states with a centralized state-imposed self-exclusion program, the release from liability is incorporated in the state statute or regulation.[72] These releases will effectively prevent any recovery on the part of the plaintiffs even if a court is willing to find that the contract was formed.

In spite of unanimity among the courts in handling these cases, various public groups and some legal scholars continue to make the case for imposing a duty upon casinos to prevent self-excluded gamblers from gambling and thus to hold casinos liable to those patrons for their gaming losses.[73] In light of plaintiffs' recent victories in similar cases in Europe and Canada, these arguments have become more and more appealing in the United States.[74] This Part will analyze whether contractual relationship is created between any parties in the result of a patron's entering into a self-exclusion program, and if so, whether recovery of gambling losses by the self-excluded patron is possible in a breach of contract cause of action.

A. What is an enforceable contract?

It is well established that a contract is a promise or a set of promises, the performance of which the law recognizes as a duty; and if such a promise is breached, the law provides remedy to the aggrieved party.[75] A prom-

Problems of Bounded Rationality, 96 GEO. L.J. 1775, 1780 (2008) (noting that self-exclusion programs lack consideration); Francisco Napolitano, *The Self-Exclusion Program: Legal and Clinical Consideration*, 19 J. GAMBLING STUD. 303, 304 (2003) (concluding that no contract is formed as a result of a self-exclusion program because no legal consideration has been exchanged between the parties); *but see* Rhea, *supra* note 15, at 468–69 (advancing arguments in support of finding consideration in the self-exclusion contract).

71. States' Self-Exclusion Forms, *supra* note 25.

72. *See, e.g.*, N.J. Stat. Ann. § 5:12-71.2(c).

73. Justin E. Bauer, *Self-Exclusion and the Compulsive Gambler: The House Shouldn't Always Win*, 27 N. ILL. U. L. REV. 63, 65 (2006) (arguing that: (1) casinos are in a better position to monitor each patron and physically exclude those on the list; and (2) casinos create a "special relationship" with gamblers who place themselves on the list and this creates a duty and subsequent liability on the casino for failing to uphold that duty); John Warren Kindt, *"The Insiders" for Gambling lawsuits: Are the Games "Fair" and Will Casinos and Gambling Facilities Be Easy Targets for Blueprints for RICO and Other Causes of Action?*, 55 MERCER L. REV. 529, 545 (2004) (stating that it is "increasingly recognized" that a self-exclusion program implies that the casinos have assumed a duty to keep the gamblers off their premises "and they breach that duty when a gambler slips in and loses thousands of dollars" (citation omitted)); National Council on Problem Gambling, *NCPG Statement to Illinois Gaming Board December 3, 2007 Special Meeting to Discuss Self-Exclusion*, Dec. 3, 2007, http://www.ncpgambling.org/files/public/Statement_to_IL_Gaming_Board.pdf (advocating "more balanced approach" to the responsibility for self-exclusion programs that would eventually "lead to clear 'duty of care' and enforceable regulatory obligations for the gaming industry").

74. *See* Rhea, *supra* note 15, at 463.

75. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

ise is a manifestation of intention to act or refrain from action in a certain way as to justify a person to whom the promise was made in understanding that a commitment has been undertaken.[76] An essential element of contract formation is a mutual manifestation of assent to the same terms which is established by a process of offer and acceptance.[77] In addition, consideration is required for the promise to be enforceable.[78]

Consideration is something of value that each party to the contract is bargaining for from the other party in exchange for giving up a legal right.[79] Thus, two elements of consideration must present to support a contract: (1) each party must do or promise to do what it was not legally obligated to do; and (2) this performance or promise must be bargained for by the other party to the contract.[80] Arguably, the offer and acceptance are present in the self-exclusion arrangement: a patron accepts the offer by a state or a casino to be placed on the self-exclusion list.[81] The legal community is divided, however, on whether self-exclusion programs are contracts supported by consideration.[82]

B. State-administered self-exclusion programs.

There are only three possible scenarios for a breach of contract suit initiated by a self-excluded patron in an effort to recover gaming losses, arising from the state-administered self-exclusion programs: (1) when a self-excluded patron sues the state alleging that a state-designed self-exclusion application constituted an enforceable contract between the patron and the state; (2) when a self-excluded patron sues a casino arguing that he is a third-party beneficiary to the licensing agreement between a state and the casino; and (3) when a self-excluded patron sues a casino for a breach of a self-exclusion contract directly. These scenarios are discussed below.

1. Patron v. State in a breach of contract action.

The process by which a patron enters into a state-run self-exclusion program and the application form itself resemble a contract. For instance, in order to be placed on a state self-exclusion list in Illinois, a patron must

76. *Id.* at § 2.
77. JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 26 (5th ed. 2003).
78. *Id.* at 172.
79. *Id.* at 176.
80. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71.
81. Rhea, *supra* note 15, at 468.
82. *See supra* note 70.

appear in person in the office of the Illinois Gaming Board (IGB), where he would have a lengthy conversation with the state employee about the terms and consequences of the program, read the state self-exclusion rules, and then sign the Illinois Self-Exclusion Application Form.[83] Then, the employee of IGB will certify that he or she personally witnessed the patron signing the self-exclusion form.[84]

Thus, it is not illogical to assume that the patron and the state entered into a contract. The state promises to require Illinois casinos to arrest the patron and prosecute him for trespassing if he is found on the premises.[85] The patron promises to refrain from entering casinos, and also to donate his winnings to a certain charity if he is caught on the gaming floor.[86] But in order for a promise to be valid, a party must promise to do something that it is not already obligated to do by law.[87] In the instant case, however, at least one of the parties—the state gaming board—promises nothing more than it is required to do under the state law, i.e. to provide the patron with an opportunity to be placed on the state's self-exclusion list.[88]

Further, the exchange of promises alone is not sufficient to constitute a contract; rather, each party must be bargaining for the promise or performance of the other party as consideration for its own promise or performance.[89] It is doubtful that a state is bargaining for an individual to refrain from visiting casinos. When the state promulgates regulations to achieve a certain result, such as combating problem gambling, there is no bargain on the part of the state in a classic contract law sense.

The patrons may argue, however, that consideration does not require a party to necessarily benefit from the other party's foregoing of its legal right.[90] In the seminal "consideration" case, *Hamer v. Sidway*, the court held that "a waiver of any legal right at the request of another party is suffi-

83. *See* Illinois Self-Exclusion Form, *supra* note 25.

84. *See id.*

85. *Id.*

86. *Id.*

87. *See* Marion Prod. Credit Ass'n v. Smith, 69 S.E.2d 705, 706 (S.C. 1952) (stating that "all jurisdictions are unanimous in holding that an agreement to do [what] one is already legally bound to do is not sufficient to support a . . . contract").

88. *See, e.g.*, MICH. COMP. LAWS ANN. 432.225 (2009) (requiring Michigan Gaming Board to create and administer a list of dissociated persons for patrons wishing to exclude themselves from the Michigan casinos).

89. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (stating that "a bargain in which there is a manifestation of mutual assent to the exchange and a consideration" is required for contract formation); § 71(1) (stating that "to constitute consideration, a performance or a return promise must be bargained for").

90. Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891).

cient consideration for a promise."[91] In *Hamer*, the court found that nephew's promise to refrain from smoking, drinking, swearing, and gambling at the request of his uncle was sufficient consideration to support uncle's promise to pay him $5,000.[92] *Hamer* is distinguishable, however, from the self-exclusion scenario because a patron is undertaking an obligation to refrain from visiting casinos at his own will and not at the request of the state gaming board, while in *Hamer* the nephew's promise was induced by the uncle's monetary reward.[93]

The only feasible argument in favor of a valid consideration could be asserted in those states where the self-excluded patron agrees to forfeit his winnings in favor of a state-owned charitable or non-profit organization.[94] In this case it could be argued that the state is bargaining for the money that the patron is forfeiting if discovered on the gaming floor with the winnings, and the patron is bargaining for the opportunity to be excluded from the state casinos.

But even if a court is willing to find that a binding agreement was entered into between the state and the patron, this agreement will not be enforceable against the state, and thus a patron will not be able to recover the lost wagers from the state. First, the scope of the state's "promise" is simply to collect the patron's information and convey it to the casinos for execution.[95] The state is "promising" only to direct the casinos within its jurisdiction to escort the patron from the premises, arrest him for trespassing, and withhold his winnings if the casino employee discovers the patron on the gaming floor.[96] Therefore, the state cannot be liable in breach of contract for failure to ensure that the casinos prevent self-excluded patrons from gambling because it never promised to do so in the first place.

Second, every state-designed self-exclusion form contains an express release provision where the patron entering into the self-exclusion program agrees to release the state, its agents, and employees from any liability associated with the administration and enforcement of the self-exclusion list by the state itself and by the casinos.[97] The patron would need to argue that

91. *Id.*

92. *Id.*

93. *See id.* at 256; Illinois Self-Exclusion Form, *supra* note 25 (stating that the program is voluntary).

94. *See, e.g.*, Illinois Self-Exclusion Form, *supra* note 25 (providing the patron a choice of three state-owned non-profit organizations to which he may donate the forfeited winnings).

95. *See id.* (stating that the Illinois Gaming Board will convey to the Illinois riverboat casinos the information that the applicant for self-exclusion has provided).

96. *See e.g.*, Indiana Self-Exclusion Form, *supra* note 25.

97. *Id.*

that release is void to overcome this hurdle.[98]

Finally, and most importantly, each state is a sovereign and thus, when acting in its official governmental capacity, the states enjoy sovereign immunity from the lawsuits brought against them.[99] There are two exceptions to this rule: (1) a state could consent to be sued under specific circumstances;[100] or (2) the United States Congress could abrogate states' sovereign immunity for certain claims by a federal statute.[101] In addition, the states could be sued when they enter into contracts as market participants, rather than in their official governmental capacity.[102] None of the exceptions are implicated in the self-exclusion scenario since no federal law is involved and no state has consented to be sued by the self-excluded patrons. Thus, the only possible route for the patrons to recover gaming losses from a state is to argue that the state was not acting in its official capacity when it entered into a self-exclusion "contract" with the patron.

Most likely, this argument is doomed to fail. For instance, in *Ormanian v. Michigan Gaming Control Board* (*Ormanian I*), a Michigan appellate court correctly upheld the dismissal of a suit filed by a self-excluded patron based on the state's sovereign immunity.[103] In that case, the plaintiff voluntarily placed herself on a "list of dissociated persons" maintained by the Michigan Gaming Control Board ("the Board") in 2002.[104] Nevertheless, she returned to gambling in 2003 and lost a substantial sum in various Michigan casinos.[105] In her suit against the Board, the plaintiff argued that the Board was not engaged in a governmental function when it allowed her to be self-excluded, and even if it was, a "proprietary function" exception to sovereign immunity under Michigan law was applicable.[106]

The court dismissed both arguments.[107] The court stated that under

98. For discussion of the potential arguments that the release provision is void as against public policy, *see* Part III of this note.

99. *See* U.S. CONST. amend. XI.

100. College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999) (holding that a state may not be sued unless it has waived its sovereign immunity through a clear declaration of consent to be sued).

101. Tennessee v. Lane, 541 U.S. 509, 532–34 (2004) (holding that Title II of the Americans with Disabilities Act properly abrogated states' sovereign immunity for suits alleging discrimination against people with disabilities in providing public access to the courts).

102. Welch Contracting, Inc. v. N.C. Dep't of Transp., 622 S.E.2d 691, 695 (N.C. App. 2005) ("Sovereign immunity is waived whenever the State, 'through its authorized officers and agencies, enters into a contract . . . [because] the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.'").

103. 2005 WL 1684565, at *1 (Mich. Ct. App. July 19, 2005) (unpublished opinion).

104. Goldman, *supra* note 13.

105. *Id.*

106. *Ormanian I*, 2005 WL 1684565, at *1–2.

107. *Id.*

Michigan law, the state is engaged in governmental function when it performs "an activity that is expressly or impliedly mandated or authorized by statute."[108] Since the Michigan Gaming Control and Revenue Act expressly mandated the Board to create and maintain the list of "disassociated persons," the court concluded that the Board's conduct in providing the self-exclusion option to the plaintiff clearly constituted a governmental function.[109]

Further, the court stated that to fall within the proprietary function exception to governmental immunity, the state must conduct an activity for the primary purpose of procuring profit, and it cannot be supported by taxes and fees.[110] The plaintiff argued that the Board administers the self-exclusion lists "to enable casino[s] . . . to prey on problem gamblers and thereby increase the state's revenue," which made the proprietary function exception applicable.[111] The court properly found such an argument to be "frivolous" for three reasons: (1) the purpose of the self-exclusion program in Michigan was not to raise revenue but to provide problem gamblers with a strong disincentive to participate in casino gambling; (2) the plaintiff speculatively assumed the wrongdoing on the part of the casinos; and (3) even if the casinos did use the Board's self-exclusion lists to encourage problem gamblers to play, the wrongful act of a third party could not be imputed to the state to transform its governmental function into a proprietary one.[112]

Therefore, success of recovery of gaming losses from the states in a breach of contract action is very unlikely because it is highly questionable whether the contract between the state and the patron exists in the first place. But even if the valid contract does exist, the state does not undertake any obligation for breach of which a patron could possibly recover his lost wagers, and, in any event, the recovery will be barred by the release of liability provisions and by the state's sovereign immunity.

2. Patron v. casino in a third-party beneficiary claim.

Another potential route for recovery of gaming losses by a self-excluded patron is to claim that he is a third-party beneficiary of a licensing contract between the state and the casino.[113] It is well settled that one who

108. *Id.* at *1.
109. *Id.*
110. *Id.* at *2.
111. *Id.*
112. *Id.*
113. Ormanian v. Detroit Entm't, LCC (Ormanian II), 2005 WL 2372084, at *1 (Mich. Ct. App. Sept. 27, 2005) (unpublished opinion) (where the plaintiff sued individual Michigan casinos claiming to

is not a party to a contract may enforce the contract by establishing that he is a third-party beneficiary to that contract.[114] The burden is on the plaintiff claiming to be a third-party beneficiary to show that: "(1) the parties intend[ed] to benefit a third party; (2) the contract imposes a duty on one of the parties in favor of the third-party; and (3) the performance of the terms of the contract renders a direct benefit to the third party intended by the parties to the contract."[115] The intent of the contracting parties to benefit the third party is the controlling factor.[116] The best evidence of such intent is a specific designation of the third party as a beneficiary in the contract, but other evidence could be presented as well.[117]

But before the plaintiff could prove himself to be a third-party beneficiary to a contract, it must be established that a valid contract existed between the parties in the first place. When confronted with this issue in *Ormanian v. Detroit Entertainment, LLC* (*Ormanian II*), the Michigan appellate court held that the licensing agreement between the Board and the casino—in which the Board granted the company a license to operate as a casino—is not an enforceable contract in the regular meaning of this term.[118] The court held that the licensing agreement was "merely part of a statutorily mandated process that required defendants to apply to the Board to be licensed to operate their casinos and the Board to grant those licenses if defendants meet the requisite eligibility requirements."[119] Thus, because the Board was mandated by the statute to issue a license to a qualified applicant, the court concluded that the Board's entering into a licensing agreement with a casino is nothing more than a fulfillment of its preexisting statutory duty and is not sufficient consideration to support a contract.[120]

However, some licensing agreements could pass muster and qualify as

be a third-party beneficiary of the licensing contract between the Michigan Gaming Board and the casinos).

114. Nat'l Bd. of Exam'rs for Osteopathic Physicians & Surgeons, Inc. v. Am. Osteopathic Ass'n, 645 N.E.2d 608, 618 (Ind. App. 4th Dist. 1994).

115. *Id.*; *accord* PERILLO, *supra* note 77, at 673.

116. *Osteopathic Physicians*, 645 N.E.2d at 618.

117. *Id.*

118. 2005 WL 2372084, at *1.

119. *Id.*; *see also* MICH. COMP. LAWS ANN. § 432.206 (1) that provides, in part, that "[t]he board shall issue a casino license to a person who applies for a license," who pays certain fees, and "who the board determines is eligible and suitable to receive a casino license under this act and the rules promulgated by the board."

120. *Ormanian II*, 2005 WL 2372084, at *1; *see also* Gen. Aviation, Inc. v. Capital Region Airport Auth., 569 N.W.2d 883, 885 (Mich. Ct. App. 1997) (holding that a "pledge to undertake a preexisting statutory duty is not supported by adequate consideration" and thus could not support a breach of contract claim).

enforceable contracts. For instance, in *City of East Chicago v. East Chicago Second Century, Inc.*, the Indiana Appellate Court found a casino licensing agreement to be a valid contract.[121] In that case the city separately negotiated with the applicant that as a condition of obtaining gaming license the casino will distribute certain percentage of its gaming profits to the expressly designated non-profit foundations of the city.[122] The Indiana Gaming Commission then incorporated the terms of this agreement as conditions of the gaming license.[123] This case is clearly distinguishable from *Ormanian II*, because in *City of East Chicago*, besides the actual gaming license, there was a separately negotiated valid contract in which the casino undertook an additional express obligation in exchange for the opportunity to bid for the gaming license.[124] Thus, the city received consideration in the form of monetary contributions that were not normally required of an applicant in order to qualify for the gaming license. In contrast, in *Ormanian II* the Board simply issued a license to a qualified applicant, pursuant to its statutory duty.[125]

Even assuming that a self-excluded patron would succeed in showing that the licensing agreement constitutes a valid contract, he must also prove that he was an intended third-party beneficiary of this contract. The licensing agreement, of course, will not mention the particular plaintiff as a beneficiary, so the patron will need to argue that problem gamblers as a class were intended third-party beneficiaries, and that he is a member of that class.[126] However, to qualify as a third-party beneficiary, the class of persons must be sufficiently described.[127]

It follows that if the licensing agreement does not discuss self-exclusion programs and does mention problem gamblers expressly, a court will find that the plaintiff was at most an incidental beneficiary. Indeed, a self-excluded person could only be inferred as a beneficiary of the casino's obligation to comply with the self-exclusion regulations, which is not

121. 878 N.E.2d 358, 370–71 (Ind. App. 2007), vacated on other grounds by City of E. Chicago v. E. Chicago Second Century, Inc., 908 N.E.2d 611 (Ind. 2009).

122. *City of E. Chicago.* 878 N.E.2d at 365–66.

123. *Id.* at 366.

124. *See id.*

125. 2005 WL 2372084, at *1.

126. *See* 17A AM. JUR. 2D *Contracts* § 436 (2006) (stating that a class of persons could be intended beneficiary of a contract, and any member of the class could enforce it).

127. *Id.*; Brunsell v. City of Zeeland, 651 N.W.2d 388, 391 (Mich. 2002) (holding that when a contractor undertook to make repairs in the sidewalks "as may be necessary for the public safety," a member of the public who slipped and fell on the sidewalk could not claim to be a member of the class of beneficiaries—general public—because such a class was not sufficiently described, and thus the pedestrian was just an incidental beneficiary who could not sue to enforce the contract).

enough to qualify for a third-party beneficiary status.[128]

Another element of the third-party beneficiary claim is a showing that a "contract imposes a duty on one of the parties in favor of the third-party beneficiary,"[129] and that the duty was breached. So, the gaming losses could be recoverable only if the licensing agreement imposed on a licensee a duty to monitor the self-excluded patrons and prevent them from gambling.[130] That is not the case. At best, the licensing agreement would mandate the licensee to comply with the state's statutes and regulations, which, in turn, only require action upon discovery of the self-excluded patrons on the premises, and not monitoring of those patrons.[131] Thus, there is no breach of contractual duty if the patron lost while gambling unbeknownst to the casino.

Finally, casinos could argue that the licensing agreement constitutes a "government contract" under which they undertake to provide gambling and entertainment services to the public at large. Then, as a general rule, the party who contracts with the governmental agency to render a service to the public is not liable to a member of the public unless the contract provides for such a liability.[132] It is very unlikely that a licensing agreement will provide for a casino's liability to its patrons, as opposed to the state, for violating the terms of the license. Accordingly, the recovery of gambling losses against the casino on the theory of a third-party beneficiary will be unsuccessful.

3. Patron v. casino in a breach of contract action.

The remaining scenario, where a patron would sue a casino for a breach of contract directly, is simply implausible in the case of a state-run self-exclusion program.[133] There is no promise on the part of a casino that would justify a patron's belief that the casino made any commitment because the self-excluding patron deals exclusively with the state's representative throughout the whole process of self-exclusion. Namely, a patron interested to be placed on the *state* self-exclusion list will have to apply in

128. *See Brunsell*, 651 N.W.2d at 391; RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

129. *Osteopathic Physicians*, 645 N.E.2d at 618.

130. *See* Kindt, *supra* note 73, at 545 (stating that it is "increasingly recognized" that a self-exclusion program implies that the casinos have assumed a duty to keep the gamblers off their premises "and they breach that duty when a gambler slips in and loses thousands of dollars" (citation omitted)).

131. *See, e.g.*, N.J. Stat. Ann. § 5:12-71.2(c) (stating that a casino will not be liable to a self-excluded person for "permitting a self-excluded person to engage in gaming activity . . . while on the list of self-excluded persons").

132. RESTATEMENT (SECOND) OF CONTRACTS § 313.

133. The fact that no attorney has yet brought such a suit on behalf of a self-excluded patron speaks volumes of feasibility of this claim.

person with the state's gaming board office where the state's employee will provide the applicant a copy of applicable state law regarding the self-exclusion and then administer the verbal questionnaire to ensure that the patron understands the program's terms and conditions.[134] Then, the patron will sign a state-designed application form which will be attested by the state's representative who administered the program.[135] Thus, even if the self-exclusion document was found to be a contract, the patron will not be justified in believing that the casino rather than the state was a party to that contract.

In any event, any obligation on the part of the casino in connection with enforcement of the state self-exclusion lists is statutorily proscribed, and thus constitutes a pre-existing duty. Since contract law is settled that performance of a party's pre-existing duty does not constitute an adequate consideration to support a contract,[136] the breach of contract action in a jurisdiction with the state-administered self-exclusion programs directly against a casino will most certainly fail.

C. Casino-administered self-exclusion programs.

Arguably, the strongest argument in favor of the existence of a contract could be made in the case of a casino-based self-exclusion program. On its face, it looks like a contract of adhesion: a casino-prepared, pre-printed form with legal terms signed by both a casino representative and a self-excluding patron.[137] Offer, acceptance, and exchange of promises are possible to establish: a casino is offering a patron to participate in the self-exclusion program, the patron accepts the offer and promises to refrain from patronizing the casino, and the casino promises to have the patron removed or even arrested, if he is discovered on the premises.[138] Disagreement exists, however, on whether this arrangement is supported by consideration to become an enforceable contract.[139]

It is highly doubtful that the self-exclusion program is a contract supported by consideration. Valid consideration requires that one party is bar-

134. *See* Kindt, *supra* note 73, at 544 (describing the self-exclusion process in Missouri).

135. *See, e.g.*, Illinois Self-Exclusion Form, *supra* note 25 (entitled "Illinois Gaming Board IGB-15 Application to the Voluntary Self-Exclusion Program for Problem Gamblers").

136. *See* Marion Prod. Credit Ass'n v. Smith, 69 S.E.2d 705, 706 (S.C. 1952) (stating that all jurisdictions are unanimous in holding that a fulfillment of a legally imposed obligation is not sufficient consideration to support a contract).

137. *See, e.g.*, Twin River Self-Exclusion Form, *supra* note 58.

138. Napolitano, *supra* note 70, at 304; Rhea, *supra* note 15, at 468.

139. *See* supra note 70 and accompanying text.

gaining for whatever the other party is giving up.[140] Here, the patron is giving up the right to gamble on the premises of the casino with the consequence of being ejected or even arrested for trespass, if caught on the premises.[141] But the casino is not bargaining for it.[142] To the contrary, it is against the casino's interest to turn away patrons and to even eject them if they come back. And since the patron does not pay to participate in the self-exclusion program and does not provide any other consideration to the casino to support the casino's promise or performance, a valid contract has not been formed.[143]

The only plausible argument in support of the existence of consideration in the self-exclusion arrangement was made by Andy Rhea in his article "*Voluntary Self Exclusion Lists: How They Work and Potential Problems.*"[144] Rhea argued that "in providing access to the programs, casinos are establishing goodwill and are therefore conducting business with moral consideration to society."[145] He pointed out that casinos could advertise the fact that they provide such a program for the gamblers and that this advertisement "could shed a favorable light upon the casinos and establish that they are not the big, bad, morally corrupt, money hungry corporations the opposition proclaims them to be."[146] Thus, Rhea argues, such good will could serve as adequate consideration to support a self-exclusion contract.[147]

This argument is flawed for at least two reasons. First, it depends on the assumption that a casino will necessarily advertise the self-exclusion program. While this could potentially be true,[148] it is not always the case. For instance, Twin River does not advertise its self-exclusion program to the general public.[149] In the absence of any favorable publicity, the argument that good will earned by a casino could serve as adequate consideration fails.

Second, even if a casino does advertise the program, the good will earned from such advertisement is not consideration to support the contract,

140. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

141. *See* Twin River Self-Exclusion Form, *supra* note 58.

142. Eaton, *supra* note 57 (stating that the gaming facility suffers a detriment as a result of the self-exclusion program because it loses the patron's business for the period of self-exclusion).

143. Napolitano, *supra* note 70, at 304.

144. Rhea, *supra* note 15, at 468.

145. *Id.*

146. *Id.* at 468–69.

147. *Id.*

148. *See* Harrah's Entertainment, *supra* note 18 (where Harrah's advertises the fact that the self-exclusion option is available for its patrons).

149. Eaton, *supra* note 57.

but rather a motive that induced the casino to provide the program in the first place.[150] Indeed, the possibility of favorable publicity is the only conceivable motive for a casino to voluntarily establish the self-exclusion program for its patrons since a casino could not possibly bargain for its patrons to refrain from coming back to the gaming floor.[151] And since the motive is not consideration to support a contract, mere desire for favorable publicity is not sufficient to bind casinos.[152]

Rhea makes a second argument in favor of contract formation: it is hard to imagine anything less when the gambler agrees to severe consequences of fines, arrests, and loss of winnings in case of his breach, "while the casino stands to lose nothing at [its] failure to oversee the program."[153] Rhea cites the case of Daniel Santangello who won and kept over sixty thousand dollars in Atlantic City while being on the New Jersey self-exclusion list in violation of the condition of self-exclusion.[154] The New Jersey Casino Control Commission ordered him to pay the winnings back enforcing the condition,[155] which looks like a breach of contract action against the gambler.

However, this argument is also flawed. First, Santangello's case arose in a jurisdiction where the self-exclusion program is state-imposed, and it was the state, not the casino, that was trying to enforce the condition.[156] If anything, this speaks in favor of the contract between the state and the patron, which was discussed and dismissed in Part II.A of this note. Second, even though Harrah's (but not Twin River's) self-exclusion form requires a self-excluding patron to forfeit the winnings if he is discovered on the premises,[157] such forfeiture cannot serve as consideration to support a con-

150. *See* 17A AM. JUR. 2D *Contracts* § 104 (2008) (stating that "[t]he motive prompting one to enter into a contract and the consideration for the contract are distinct and different things. Parties are led into agreements by any inducements, such as the hope of profit, the expectation of acquiring what they could not otherwise obtain, the desire of avoiding a loss, and the like. These inducements are not, however, either legal or equitable consideration, and actually comprise no part of the contract. They are not the bargained-for exchange or legal detriment necessary to establish a legally valid contract." (Citation omitted.)).

151. *See* PERILLO, *supra* note 77, at 177 (stating that motive of the promisor that induces him to enter into a contract is not a consideration sufficient to support the contract).

152. *Cf.* Allman v. Boner, 1993 WL 541111, at *2 (Tenn. Ct. App. Mar. 21, 1993) (unpublished opinion) (stating that the *goodwill* that might have induced the former political candidate to return campaign contributions after withdrawing from the race was just his *motive* that do not qualify as consideration to support his promise to make refunds).

153. Rhea, *supra* note 15, at 469.

154. *Id.* at 463.

155. Joe Weinert, *Self-Casino Ban Violator Ordered to Forfeit $64K*, THE PRESS OF ATLANTIC CITY, Oct. 16, 2003.

156. *Id.*

157. Harrah's Self-Exclusion Form, *supra* note 56.

tract. The forfeiture provision is simply an incentive for a patron to refrain from returning to the casino since the possibility of winning is perhaps the strongest enticement of gambling.

In the absence of consideration, the self-exclusion program is nothing more than a social service or accommodation for the patrons who need help.[158] Thus, the patrons have no recourse against the provider of the accommodation in the event they incurred damages for failing to combat their addiction. To illustrate, Alcoholics Anonymous (AA) requires a participant to give up drinking in order to join the recovery program.[159] If the participants resort to drinking and incur some damage as a result, it is inconceivable that they could sue AA because AA provided them with such a social service.

But even if a court finds that an enforceable contract exists between a casino and a patron by way of a self-exclusion arrangement, no breach will be found on the part of the casino. Both Twin River and Harrah's only undertake to eject the patron out and have him arrested *if* he is discovered on the gaming floor.[160] The casinos do not promise to monitor the patron and prevent him from entering the facility or, if he enters, prevent him from gambling.[161] Thus, the patron would only be able to recover gambling losses if he shows that the casino knew he was gambling and did not remove him from the facility. This, however, is a heavy burden to carry considering that there are thousands of people on the gaming floor of any casino at any given time.

Finally, since every self-exclusion form designed by a casino necessarily contains a release clause relieving the casino from any liability in connection with the administration of the self-exclusion program,[162] the recovery of gaming losses by a patron will only be possible in the unlikely event that a court disregards such a release on the ground that it violates public policy.[163]

158. Eaton, *supra* note 57 (stating that the Twin River's self-exclusion program is a social service for the gamblers); Napolitano, *supra* note 70, at 305 (calling the self-exclusion program "an accommodation").

159. Alcoholics Anonymous, *Information on A.A.*, http://www.aa.org/lang/en/subpage.cfm?page=1 (last visited Feb. 15, 2009).

160. Twin River's Self-Exclusion Form, *supra* note 58; Harrah's Self-Exclusion Form, *supra* note 56.

161. Twin River's Self-Exclusion Form, *supra* note 58; Harrah's Self-Exclusion Form, *supra* note 56.

162. Twin River's Self-Exclusion Form, *supra* note 58; Harrah's Self-Exclusion Form, *supra* note 56.

163. For discussion of public policy concerns in release provision, *see* Part III of this note.

D. Patron vs. casino on the theory of promissory estoppel.

The doctrine of promissory estoppel provides a remedy for certain promises or agreements that are otherwise unenforceable under the traditional contract law doctrines, including for lack of consideration.[164] To claim relief under the doctrine of promissory estoppel, the plaintiff must establish four elements:[165] (1) there must be a promise, which is defined as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made;"[166] (2) the promise must be one which the promisor should reasonably anticipate will lead the promisee to act or forbear in reliance on the promise; (3) "the promisee must have actually acted or 'forborne' in reliance on the promise"; and (4) the plaintiff must show that injustice could be avoided only by the enforcement of the promise.[167]

Although no troublesome issues of consideration are implicated,[168] it is doubtful that the patron will be able to show the elements of this cause of action. To begin, it is dubious at best whether there is an actual promise on the part of the state gaming boards or casinos. Indeed, every self-exclusion document is written in the form of a patron's request to be excluded from certain casinos, accompanied by a statement that it is the sole responsibility of the requesting patron to stay away from these casinos, and that neither the state nor the individual casino undertakes any duty with respect to preventing the patron's access to their premises.[169] Such a strong disclaimer could hardly be interpreted as a promise to the contrary.

Perhaps a more successful argument for the patrons would be that an implied promise exists.[170] For instance, patrons might point out that many, if not all, self-exclusion forms provide that the self-excluded patron will be escorted out of the premises if caught on a casino floor.[171] Undertaking the

164. PERILLO, *supra* note 77, at 253–54.

165. RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

166. RESTATEMENT (SECOND) OF CONTRACTS § 2(1).

167. RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

168. *See* PERILLO, *supra* note 77, at 253 (stating that from its original inception the doctrine of promissory estoppel has been developed as a substitute for or equivalent of consideration).

169. *See, e.g.*, Iowa Self-Exclusion Form, *supra* note 25 (stating that by accepting the patron's self-exclusion request and taking reasonable steps to abide by it, the casinos "are not creating or assuming a duty nor are they obligated in any way to prevent [a patron's] access" to their facilities); Illinois Self-Exclusion Form, *supra* note 25 (stating that it is not the duty of the Illinois casinos to preclude a self-excluded patron's entry into a casino).

170. *See, e.g.*, Wright v. Newman, 467 S.E.2d 533, 535 (Ga. 1996) (inferring a promise to pay child support on the part of the plaintiff's boyfriend who was not the father of the child but who listed himself as a father on child's birth certificate, gave the child his last name, and was holding himself out as child's father for ten years).

171. *See, e.g.*, Colorado Self-Exclusion Form, *supra* note 25.

duty to remove the patron from the casino if he is caught could also imply that the casino will not admit the patron in the first place. In addition, the patron may argue that an implied promise is made simply by virtue of establishing the self-exclusion program, especially when the casino is not obligated to do so under the state law.[172] However, the courts are generally not inclined to find such implied promises,[173] especially when, as here, the purported promisor has done nothing "to justify a promisee in understanding that a commitment has been made."[174]

But even if a court will find that an implied promise has in fact been made, the patron must show that he relied on this promise—that he would not have acted in a certain way but for the promise.[175] It would be difficult to argue that the patron would not have returned to the premises of the casino and gambled but for the casino's "promise" to prevent him from gambling.

Equally as difficult would be showing that such reliance was reasonable, where each and every self-exclusion form contains an explicit disclaimer, relieving the state and/or casino of any responsibility associated with the self-exclusion program.[176] In addition, most self-exclusion forms stress that it is a patron's responsibility *alone* to stay away from gambling establishments.[177]

Indeed, it is unreasonable on the part of the patron to blame a casino for his own gambling problem claiming detrimental reliance. For instance, in *Williams v. Aztar In. Gaming Corp.*, plaintiff raised, *inter alia*, a promissory estoppel claim against the casino for failure to evict him from its gaming facility when the casino employees knew he was a compulsive

172. *Cf.* Wood v. Lucy, Lady-Duff Gordon, 118 N.E. 214, 214–15 (N.Y. 1917) (where the court inferred a promise on plaintiff's part to use reasonable efforts to market the defendant's designs, from an elaborate written instrument that granted plaintiff an exclusive agency to do so but omitted any obligation on the part of the plaintiff).

173. PERILLO, *supra* note 77, at 255.

174. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2 (1) (1981).

175. *See* Clark v. Byrd, 564 S.E.2d 742, 745 (Ga. Ct. App. 2002) (holding that plaintiff must show a substantial change in position in reliance on defendant's promise, to satisfy the detrimental reliance element of the promissory estoppel claim).

176. *See, e.g.*, Pennsylvania Self-Exclusion Form, *supra* note 25(stating that the Board and the gaming establishments are not liable for any acts or omissions in the processing or enforcement of the self-exclusion requests); Illinois Self-Exclusion Form, *supra* note 25 (stating that "I fully accept that it is not the duty of the riverboat casino operators or the State of Illinois to preclude my entry into a riverboat casino").

177. Colorado Self-Exclusion Form, *supra* note 25 ("I understand that the ultimate responsibility to refrain from gaming activities and to refrain from visiting casinos is mine alone and Colorado casinos . . . will not be responsible for the enforcement or non-enforcement of this agreement."); Iowa Self-Exclusion form, *supra* note 25 (stating that "[t]he ultimate responsibility to limit my access to any Iowa or other casino remains mine alone").

gambler.[178] Even though the plaintiff was not on the state's self-exclusion list, Aztar sent him a "Cease Admissions" letter stating that prior to gambling at the casino in the future, he must present medical or psychological information demonstrating that gambling does not pose a threat to his safety or well-being.[179] Nevertheless, the plaintiff returned to the casino a year later and lost about twenty thousand dollars in eighteen months.[180] In his suit to recover the gambling losses, the plaintiff argued that by sending the Cease Admissions letter the casino undertook a "gratuitous" duty of care, entitling him to a promissory estoppel claim.[181] The court held, however, that even if Aztar's communication to the plaintiff could be construed as a "promise" to deny him entrance to the casino, "Aztar could not have expected the plaintiff to rely on its ban to frustrate his own self-initiated attempts to return to the slot machines; nor would such reliance by the plaintiff have been reasonable as a matter of law."[182] The court stressed that "Aztar neither assumed by its actions nor otherwise owed to the plaintiff a duty to protect him from his own compulsive behavior."[183] Even though this case did not involve a self-exclusion program *per se*, it is evident from its holding that the rationale given by the court for denying a promissory estoppel claim is still applicable.

Finally, even if the plaintiff could show all four elements of promissory estoppel, it will not mean that a court will automatically award the patron his gaming losses. The remedy in such a cause of action is flexible and not as broad as that which would be available for breach of contract.[184]

III. EXCULPATORY CLAUSES RELIEVING CASINOS AND THE STATES FROM ANY LIABILITY ASSOCIATED WITH THE SELF-EXCLUSION PROGRAMS ARE NOT AGAINST PUBLIC POLICY AND SHOULD BE ENFORCED.

Even if courts would be willing to find that a valid contract existed between the self-excluded patron and the state and/or the casino, the patron would need to overcome an additional hurdle in order to recover gambling losses, namely, to invalidate any terms of the contract that release the casino and the state from any liability associated with the enforcement of his

178. 2003 WL 1903369, at*1, 8 (S.D. Ind. Apr. 5, 2003).
179. *Id.* at *1.
180. *Id.* at *2.
181. *Id.* at *8.
182. *Id.*
183. *Id.*
184. PERILLO, *supra* note 77, at 271.

self-exclusion request.[185]

The common law is well settled that, while the exculpatory clauses or releases are unfavored, they are not per se unenforceable.[186] As a general rule, a release is valid when: (1) the attempt to excuse a party from liability is clear, definite and unambiguous; (2) the act in question does not fall greatly below the standard established by law for protection of others; and (3) the release does not violate public policy.[187] Since the releases in the self-exclusion forms are clear and definite, and since no negligence is involved, the best argument for invalidating the release would be to assert that it violates public policy.

In determining whether an exculpatory clause violates public policy, courts have recognized that this concept "embodies the common sense and common conscience of the community."[188] In other words, "[p]ublic policy is that principle of law under which freedom of contract is restricted by law for the good of the community."[189] The ultimate determination of what constitutes the violation of public policy is normally made by the court in light of the totality of the circumstances of any given case.[190] However, a frequently cited California Supreme Court case, *Tunkl v. Regents of the University of California*, developed several factors (*Tunkl* factors) relevant to this determination: whether (1) the release concerns a business of a type generally thought suitable for public regulation; (2) the party seeking exculpation performs a service of great public importance which is often a matter of practical necessity for some members of the public; (3) as a result of the essential nature of the service, the party invoking exculpation has a decisive bargaining advantage; (4) in exercising a superior bargaining power the party confronts the public with a standardized contract of adhesion and does not allow negotiation of the exculpatory provision, and (5) the person or property of the signatory, as a result of the transaction, is placed under the control of the party seeking exculpation, subject to the risk of carelessness by that party or it agents.[191] Courts are in agreement that an exculpatory clause may affect the public interest adversely even if some of these factors are not implicated, in which case a court will conduct a balancing test, weighing these and other relevant considerations under the

185. *See* note 176, *supra* and accompanying text.
186. Richards v. Richards, 513 N.W.2d 118, 121 (Wis. 1994).
187. Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10 (Wash. 1992).
188. *Richards*, 513 N.W.2d at 121.
189. *Id.* (internal quotations omitted).
190. Brown v. Soh, 909 A.2d 43, 47 (Conn. 2006).
191. 383 P.2d 441, 445–46 (Cal. 1963).

totality of the circumstances.[192]

Utilizing these factors, self-excluded patrons could argue that, regardless of whether the program is implemented by the state or the individual casino, a patron has no bargaining power[193] with regard to the self-exclusion form whatsoever.[194] A patron wishing to be placed on the self-exclusion list does so by signing a self-exclusion application form and attesting that he understands all the terms and conditions of the program.[195] The patron cannot cross out release provisions or at least negotiate their scope or effect. In addition, the patrons signing the self-exclusion application are in a very vulnerable position, often having to admit that they are pathological gamblers, perhaps for the first time in their lives.[196] This weakens their bargaining power even more.[197] But this is the only factor that would place the scale of the balancing test on patrons' side, with all other factors weighing heavily in favor of casinos.

For instance, self-excluded patrons could argue that by signing a self-exclusion form, they are placing their "persons" under the casino's control, subject to the risk of carelessness by the casino or its agents.[198] In other words, their well-being depends upon how effectively the casino will enforce the self-exclusion request. However, this argument is flawed because each self-exclusion form stresses that it is ultimately the patron's responsibility to refrain from entering the casinos.[199] This situation is distinguishable from those where a person or property of the signatory is truly under control of the party seeking to release itself from liability.[200]

Another argument for gamblers is that casinos possess the ability and are in the best position to prevent self-excluded patrons from entry.[201] In

192. *Brown*, 909 A.2d at 48.

193. The term "bargaining power" is used in this context in a sense of a negotiating power, and not to allude that a bargain is taking place between casino and patron.

194. *See Tunkl*, 383 P.2d at 446 (factor (4)), 60 Cal.2d at 99–100.

195. *See, e.g.*, Illinois Self-Exclusion Form, *supra* note 25 (requiring the patron to sign the application form and to confirm that he or she understood every term of the program, by placing initials next to the each term separately stated).

196. *See, e.g.*, Missouri Self-Exclusion Form, *supra* note 25 (requiring the patron to sign under the following statement: "I acknowledge/accept that I am a problem gambler and that I am unable to gamble responsibly.").

197. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 671-72 (4th ed., 2000) (describing disorders associated with pathological gambling).

198. *See Tunkl*, 383 P.2d at 446 (factor (5)), 60 Cal.2d at 101.

199. *See, e.g.*, Colorado Self-Exclusion Form, *supra* note 25 (containing the following statement: "I understand that the ultimate responsibility to refrain from gaming activities and to refrain from visiting casinos is mine alone").

200. See Franklin v. S. Pac. Co., 203 Cal. 680, 689–90 (Cal. 1929) (where the plaintiff's shipment was in the exclusive control of the defendant-railroad).

201. Bauer, *supra* note 73, at 65.

his article entitled "*Self-Exclusion and the Compulsive Gambler: The House Shouldn't Always Win*," Jason Bauer argues that casinos could instantly know when the self-excluded person walks in the door by using the newest face recognition technologies or even regular surveillance cameras.[202] And surely, Bauer continues, the casino could find out that a self-excluded patron is placing the bets by keeping track of the players' club cards swept on the gaming floor, or by simply training its employees to check gamblers' identifications against the list of the self-excluded persons.[203] Therefore, the argument could be made that our society expects casinos that have implemented a self-exclusion program to actually monitor problem gamblers and prevent their access to gambling.

The premise of this argument is at least debatable, however. First, who else but the gamblers themselves are in a better position to prevent their own entry into a casino—just by not entering the casino? Further, industry representatives have repeatedly argued that monitoring each patron and checking everyone's identifications against the list of self-excluded persons would not only be extremely burdensome but would also diminish the status of casinos as places of social entertainment and relaxation, making them comparable to a prison camp.[204] Finally, it is very unlikely that a self-excluded patron will retain his players' club card after the self-exclusion[205], or even use his own identification in attempt to collect the winning.

Finally, Bauer argues that by offering the self-exclusion program to problem gamblers, the states' gaming boards or casinos create a "special relationship" with those patrons who put themselves on the self-exclusion list, hereby creating a duty and subsequent liability for failing to perform that duty. [206] Bauer explains that by allowing the patron to be placed on the self-exclusion list, the casino or the state gaming board voluntary assists the gambler in peril (suffering from a compulsive gambling disorder) and

202. *Id.* at 82–84.

203. *Id.* at 83–84.

204. *See, e.g.*, Benston, *supra* note 48 (quoting industry insiders that (1) some self-excluded gamblers use pseudonyms or disguises to enter casinos; and (2) the casinos are not only gambling establishments but also places for social relaxation and certain atmosphere must be maintained); Crystal Yednak, *Slamming Door on Problem Gamblers*, CHICAGO TRIBUNE, Sept. 8, 2006 (where an industry insider questions whether it is worth carding 27 million people to try to catch a few sneaking in violation of a self-exclusion program).

205. *See, e.g.*, Pennsylvania Gaming Control Board, Instructions to the Request for Voluntary Self-Exclusion from Gaming Activities, *available at* http://www.pgcb.state.pa.us/files/compulsive/Self_Exclusion_Application_and_Instructions.pdf (last accessed March 13, 2009) (stating that the player club membership privileges will be withheld from a self-excluded person).

206. Bauer, *supra* note 73, at 84–85.

implies to the gambler that he will be excluded if he tries to come back.[207] This implication may prevent the patron from attempting to seek help elsewhere for his addiction.[208] Thus, the argument goes, it would be against public policy to allow the casino and the state to escape liability by inserting an exculpatory clause into the self-exclusion application.

But even accepting as true Bauer's presumptions regarding the ease with which the casinos could monitor their patrons and the mindset of the gamblers regarding the self-exclusion programs, it does not mean that the release provisions contradict "the common sense and common conscience of the community."[209] First, the law is willing to disturb the parties' freedom of contract and strike out a certain clause only when the party seeking exculpation is performing a service of great public importance, amounting to the public necessity.[210] Such businesses have been found to include, for instance, common carriers and public utility companies.[211] On the other hand, a court found that an exculpatory clause in the contract between a private gym and its patron releasing the gym from liability for the patron's personal injuries sustained while using the gym did not violate public policy.[212] Clearly, the casino business is much more comparable to a gym than to a common carrier or a utility company. There is no public "necessity" or "great importance" in the gaming services provided by a casino, and thus this *Tunkl* factor supports the casinos' position.[213]

Second, state law in each state with commercial gaming either explicitly shields the state gaming board and the casinos from any liability in connection with maintaining and enforcing self-exclusion requests[214] or is silent on whether such cause of action exists.[215] Thus, at least in some states, policy-makers realized that neither the state officials nor the casinos should bear the responsibility for preventing patrons' access to casinos.

207. *Id.* at 85.

208. *Id.* (if a person voluntarily undertakes to render aid to someone else and does it in a negligent way, the rescuer is liable for his negligence, even though he was not obligated to provide aid at the first place).

209. *See Richards*, 513 N.W.2d at 121.

210. *See Tunkl*, 383 P.2d at 445 (factor (2).

211. Bisso v. Inland Waterways Corp., 349 U.S. 85, 89–91 (1955); Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939, 940 (4th Cir. 1945).

212. Ciofalo v. Vic Tanney Gyms, Inc., 177 N.E.2d 925, 926-27 (N.Y. 1961).

213. *See Tunkl*, 383 P.2d at 445 (factor (2)).

214. *See, e.g.*, MICH. COMP. LAWS ANN. 432.225(14) (2009) (stating that "[t]his [Michigan Gaming Control and Revenue Act] does not create any right or cause of action on behalf of the individual whose name is placed on the list of disassociated persons against the State of Michigan, the board, or a casino licensee").

215. *See, e.g.*, Merrill v. Trump Ind., Inc., 2002 WL 1307304 at *5 (N.D. Ind. May 9, 2002) (stating that "Indiana law is silent as to whether it would recognize a duty on the part of the casino to evict a compulsive gambler").

Rather, responsibility is placed on the patrons to control their addictions. Since the states' legislatures had made such a policy choice, the self-exclusion document written in accordance with such a policy by definition cannot be against public policy.

But even if a state legislature is silent, the Seventh Circuit Court of Appeals in *Merrill v. Trump Indiana* affirmed the district court's holding that the absence of a duty on the part of the casino to evict a self-excluded person does not violate public policy.[216] Both the Seventh Circuit and the district court in *Merrill* pointed out that gaming is such a heavily-regulated activity that if the legislature wished to place an additional duty upon the casinos, it would have expressly done so.[217] In addition, the Seventh Circuit noted that the casino's obligation to follow regulations promulgated by the gaming commission "does not automatically translate into a duty of care owed to compulsive gamblers."[218] Thus, public policy cannot be violated by the release of the casinos and gaming boards from liability even in those states where the legislature is silent on the issue of a duty owed to the gamblers as a result of entering into the self-exclusion program.

Furthermore, not only do many state statutes relieve casinos and state gaming boards from any liability in connection with the self-exclusion programs, but also the common law never imposed any duty on the purported defendants.[219] The *Merrill* court compared such a duty to the one of tavern proprietors to their patrons.[220] While the dram shop under certain circumstances could be liable for injuries caused by its intoxicated patron to the third party, it is not answerable for the injuries sustained by the intoxicated patron himself.[221] Thus, the court held that the self-excluded patrons should not be protected by the common law from the destructive effects of their gambling just as drunk drivers are not protected from the consequences of their conduct.[222]

The final, but perhaps the most important argument for upholding the release provision stems from the intent behind the self-exclusion programs—to support a gambler's desire to overcome the addiction without

216. 320 F.3d 729, 732 (7th Cir. 2003); *Merrill*, 2002 WL 1307304 at *5 (stating that "[b]ecause Indiana legislature has procured such comprehensive statutes and regulations to create and control the riverboat gaming industry, which do not include the duty in question, the Court finds that public policy would not favor imposing a duty on the casino to evict a known compulsive gambler").

217. *Merrill*, 320 F.3d at 732; *Merrill*, 2002 WL 1307304 at *5.

218. *Merrill*, 320 F.3d at 732.

219. *Id.*

220. *Id.* at 733.

221. *Id.*

222. *Id.*

shifting the main responsibility for action to a casino.[223] In fact, the self-exclusion program was intended to be "a supportive tool" for the individuals who realized and acknowledged their gambling problem "and were actively working to maintain [their] abstinence from gambling."[224] It was meant "to strengthen the individual's internal commitment to recovery" but place the main responsibility for compliance with the program on the self-excluded patron himself.[225]

To hold casinos and states liable for compulsive gamblers' losses will be counter-productive because it will allow compulsive gamblers to "abuse the self-exclusion programs by remaining in denial and by viewing the casino as the source of their problem."[226] This denial is reinforced if the patron enters the casino in violation of the terms of the self-exclusion program, gambles and loses, and "then receives a monetary award as the result of the lawsuit in which he blames the casino for not keeping him out."[227] This approach does not make the self-exclusion program more effective, but rather completely defeats its purpose.[228]

For all these reasons, public policy considerations do not invalidate the release provisions in the self-exclusion forms; rather "common sense and common conscience of the community" require that the release provisions remain in effect. Such provisions are necessary in order to avoid "a system of institutionalized denial," to achieve the goals and purposes of the self-exclusion programs,[229] and thus to serve the public good.[230]

CONCLUSION

Casinos and states offering self-exclusion programs to compulsive gamblers should not be held liable for the patrons' gambling losses incurred while the self-exclusion program is in effect. Participation in the self-exclusion program does not create contractual relationship between the self-excluding patron and the state and/or the casino, offering the program. But even if a "self-exclusion contract" exists, neither the state, nor the ca-

223. *See* American Gaming Association, *Self-Exclusion 101*, RESPONSIBLE GAMING Q. (Winter, 2003), *available at* http://www.americangaming.org/rgq/rgq_detail.cfv?id=134 (last visited Feb. 14, 2009) (quoting Kevin Mullally, executive director of the Missouri Gaming Commission and the creator of the country's first self-exclusion program).

224. O'Hare, *supra* note 5, at 190.

225. *Id.*

226. *Id.* at 191.

227. *Id.*

228. *Id.*

229. *Id.*

230. *See Richards*, 513 N.W.2d at 121.

sino owes a contractual duty to the gamblers to prevent them from gambling. Courts should maintain the status quo and continue honoring the release provisions that discharge the states and the casinos from any liability in connection with the administration of the self-exclusion programs. Despite certain arguments to the contrary, common sense, public policy, and existing case law dictate that holding otherwise would not only be extremely burdensome upon the gaming industry but also would lead to absurd and counter-productive results.